

DURIE TANGRI LLP
BENJAMIN B. AU (SBN 237854)
bau@durietangri.com
953 East 3rd Street
Los Angeles, CA 90013
Telephone: 213-992-4499
Facsimile: 415-236-6300

GALIA Z. AMRAM (SBN 250551)
gamram@durietangri.com
RAGHAV R. KRISHNAPRIYAN (SBN 273411)
rkrishnapriyan@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant SUBHASH JAY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

SUBHASH JAY,

Defendant.

Case No. 3:17-CR-00176-CRB-1

**DEFENDANT SUBHASH JAY'S
EMERGENCY NOTICE OF MOTION AND
MOTION FOR A REDUCTION IN
SENTENCE PURSUANT TO 18 U.S.C. §
3582(C)(1)(A)(I) (COMPASSIONATE
RELEASE)**

Date: July 15, 2020
Time: 1:30 p.m.
Ct rm: 6-17th Floor
Judge: Honorable Charles R. Breyer

REDACTED VERSION

1 TO THE HONORABLE COURT AND COUNSEL FOR THE GOVERNMENT:

2 PLEASE TAKE NOTICE that on July 15, 2020 at 1:30 p.m. or at a time set by the Court as soon
3 as practicable given the emergency nature of this motion, via telephone or videoconference in the above-
4 referenced Court, Subhash Jay (“Mr. Jay” or “Defendant”), by and through his attorneys, will move this
5 Honorable Court, for an order reducing in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)
6 (Compassionate Release).

7 This Motion is made on this Notice, the following Memorandum of Points and Authorities, the
8 attached declarations, the papers and pleadings on file herein, and on such additional papers and
9 arguments as may be presented at or before the hearing on this matter.

10 Dated: June 5, 2020

Respectfully submitted,

11 DURIE TANGRI LLP

12 By: /s/ Benjamin B. Au
13 BENJAMIN B. AU
14 GALIA Z. AMRAM
RAGHAV K. KRISHNAPRIYAN

15 Attorneys for Defendant SUBHASH JAY
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I. INTRODUCTION

Subhash Jay is 61 years old and suffers from [REDACTED]. He is a first-time, nonviolent offender with an exemplary record of good behavior in prison. His current release date, absent a further order of the Court, would be January 27, 2021. As of the filing of this motion, he has served nearly 18 months out of his 30-month sentence—over 70% of his sentence after accounting for good time credits.

On May 6, 2020, counsel on Mr. Jay's behalf petitioned the warden for compassionate release pursuant to 18 U.S.C. § 3282(c)(1)(A), on the basis that his health conditions place him at "high risk" of severe illness or death from COVID-19. The warden notified Mr. Jay of his denial of that request the following Monday, May 11, 2020. Mr. Jay's appeal of that decision is pending, but because 30 days have passed since the warden received his request, his administrative remedies are exhausted.

In light of his vulnerability to COVID-19 due to his health conditions, Mr. Jay respectfully moves this Court for immediate compassionate release. Mr. Jay's pre-existing medical conditions, combined with the exponential spread of this disease through the federal prison system, present extraordinary and compelling circumstances that justify granting this motion.

II. BACKGROUND

A. Procedural Background

Mr. Jay pled guilty on March 23, 2018, to one count of filing false tax returns under 26 U.S.C. § 7206 and one count of operating an unlicensed money transmitting business under 18 U.S.C. § 1960. *See* Declaration of Benjamin Au submitted herewith ("Au Decl.") ¶ 2a; *id.* Ex. A, *USA v. Jay* Docket. On September 5, 2018, this Court sentenced Mr. Jay to 30 months' imprisonment, three years of supervised release, a special assessment of \$200, and restitution of \$409,871 to the Internal Revenue Service. *See* Au Decl. Ex. B, ECF No. 40 in *USA v. Jay*. He is currently housed at the Giles W. Dalby Correctional Facility in Post, Texas, and is due to be released on January 27, 2021, approximately seven-and-a-half months from now, after having served approximately 18 months of his sentence. *See* Au Decl. Ex. C, BOP Inmate Registry Entry for S. Jay. Mr. Jay has no other criminal history other than the offenses that gave rise to his current prison term, and has had no disciplinary violations while imprisoned. *See* Declaration of Subhash Jay submitted herewith ("Jay Decl.") ¶¶ 2, 3.

1 Mr. Jay submitted a written request to the warden of his prison asking the Bureau of Prisons to
 2 file a motion for his compassionate release on May 6, 2020, and submitted additional information
 3 regarding his proposed release plan on May 11, 2020. *See* Au Decl. Ex. D, May 6, 2020 Request for
 4 Compassionate Release; *id.* Ex. E, May 11, 2020 Follow-up Request. In a letter dated May 11, 2020, the
 5 warden acknowledged that Mr. Jay “ha[s] been diagnosed with or suffer[s] from various medical
 6 conditions that could possibly cause [him] to be more susceptible to contracting the coronavirus,” but
 7 denied his request on the purported basis that there is an unresolved immigration detainer pending against
 8 Mr. Jay and because he is not a citizen or national of the United States. *See* Au Decl. Ex. F, Warden
 9 Friend’s Compassionate Release Review Ltr. at 3. Mr. Jay—who is a citizen of the United Kingdom, has
 10 lived in the United States since 1990, and is a lawful permanent resident—has no record of receiving
 11 such a detainer, and we cannot confirm whether it exists. *See* Au Decl. ¶¶ 2b, 3.

12 **B. Mr. Jay Suffers from a Number of Serious Health Conditions.**

13 Mr. Jay presently suffers from and is treated for a number of serious medical conditions,
 14 including [REDACTED]

15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

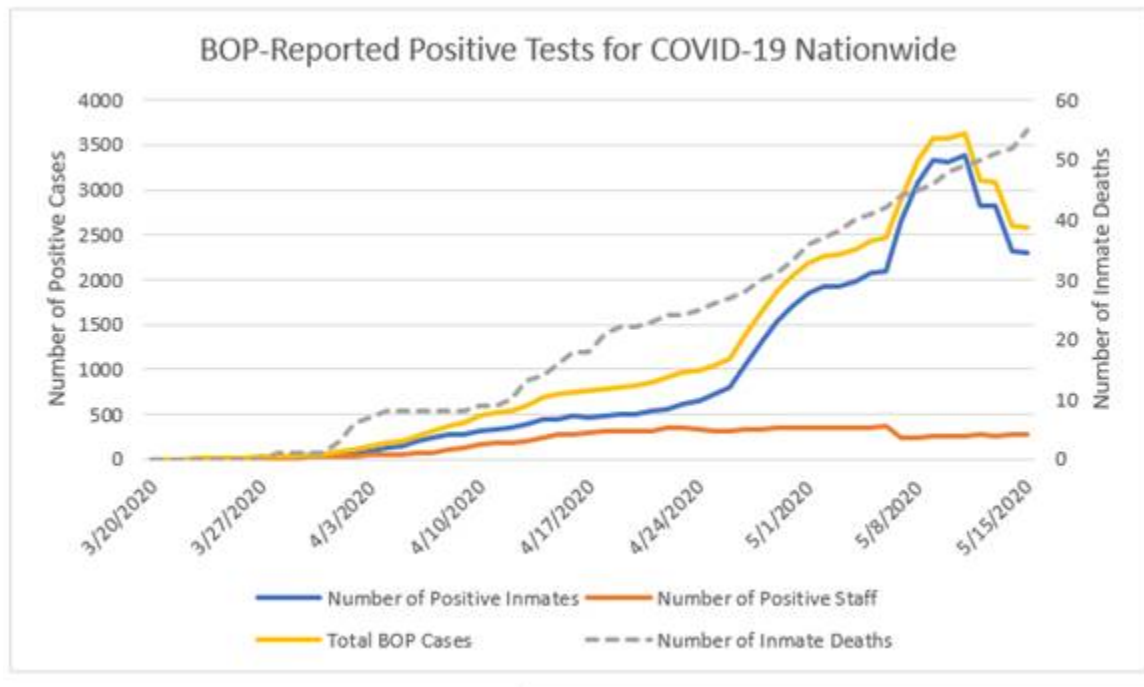
24 These issues have worsened during Mr. Jay’s time in prison. [REDACTED]

25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

C. COVID-19 Has Devastated the Prison System.

“The COVID-19 pandemic is extraordinary and unprecedented in modern times in this nation. It presents a clear and present danger to free society for reasons that need no elaboration.” *See United States v. Burrill*, No. 17-CR-00491-RS-1, 2020 WL 1846788, at *2 (N.D. Cal. Apr. 10, 2020) (citations omitted).

The COVID-19 pandemic has already claimed the lives of many housed in BOP facilities. As of June 4, 2020, at least 75 federal inmates have died of COVID-19. *See* Au Decl. Ex. G, Fed. BOP COVID-19 website. These numbers are very likely understated, because they do not include inmates in private prisons like the one that houses Mr. Jay. *See* Maxine Bernstein, *Federal Bureau of Prisons not tracking coronavirus cases in privately-run prisons that house 28,000 federal inmates*, *The Oregonian* (May 1, 2020), <https://www.oregonlive.com/coronavirus/2020/05/federal-bureau-of-prisons-not-tracking-coronavirus-cases-in-privately-run-prisons-that-house-28000-federal-inmates.html>. Even more worrying than the sheer number of deaths and cases is the trend—the slope of COVID-19 deaths remains high even as it has flattened in the U.S. population at large:¹



¹ Chart compiled by Rachel Bass based on figures from <https://www.bop.gov/coronavirus/>.

1 The CDC has explained that incarcerated inmates, who by definition are housed with numerous
 2 others, are at increased risk. *See CDC, Interim Guidance on Management of Coronavirus Disease 2019*
 3 *(COVID-19) in Correctional and Detention Facilities* (March 23, 2020),
 4 <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>. Inmates
 5 “live, work, eat, study, and recreate within congregate environments, heightening the potential for
 6 COVID-19 to spread once introduced,” and “options for medical isolation of COVID-19 cases are
 7 limited.” *Id.* at 2. Moreover:

8 There are many opportunities for COVID-19 to be introduced into a
 9 correctional or detention facility, including daily staff ingress and egress;
 10 transfer of incarcerated/detained persons between facilities and systems, to
 11 court appearances, and to outside medical visits; and visits from family,
 12 legal representatives, and other community members. Some settings,
 particularly jails and detention centers, have high turnover, admitting new
 entrants daily who may have been exposed to COVID-19 in the
 surrounding community or other regions.

13 Persons incarcerated/detained in a particular facility often come from a
 14 variety of locations, increasing the potential to introduce COVID-19 from
 different geographic areas.

15 *Id.*

16 **III. ARGUMENT**

17 Mr. Jay should be released pursuant to 18 U.S.C. § 3582(c)(1)(A). Under Section 3582(c), a
 18 court may modify a term of imprisonment on motion from a defendant if “the defendant has fully
 19 exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the
 20 defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the
 21 defendant's facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A). Upon such motion, a court may
 22 modify a defendant's sentence “after considering the factors set forth in § 3553(a) to the extent
 23 applicable” if it finds “extraordinary and compelling reasons to warrant such a reduction” and “such a
 24 reduction is consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* §
 25 3582(c)(1)(A)(i). Each of these factors is met here.

A. The COVID-19 Pandemic and Mr. Jay's Risk Factors Constitute "Extraordinary and Compelling" Circumstances "Warrant[ing] Immediate Release from Custody."

This Court may grant Mr. Jay compassionate release and reduce his sentence "if it finds that ... extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). Such a reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(1)(A). The Sentencing Commission has defined "extraordinary and compelling reasons" to include "a serious physical or mental condition ... that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover," *see* U.S.S.G. § 1B1.13 cmt. N.1(A)(ii). The numerous medical conditions that Mr. Jay suffers from—conditions that place him at much higher risk of death from COVID-19 relative to the general populace—now constitute just such "a serious physical or mental condition." These include type 2 diabetes, hypertension, and a history of heart disease.

We need not belabor a point this Court itself has made on multiple occasions over the last few weeks. *See, e.g., United States v. Sarkisyan*, No. 15-CR-00234-CRB-15, 2020 WL 2542032, at *2 (N.D. Cal. May 19, 2020) (granting compassionate release where offender was non-violent and suffered from hypertensive heart disease and other conditions despite the lack of confirmed cases at his facility); *United States v. Reid*, No. 17-CR-00175-CRB-2, 2020 WL 2128855, at *3 (N.D. Cal. May 5, 2020) (granting compassionate release because defendant's medical conditions including hypertension were "serious physical or mental condition[s]" in the context of COVID-19); *United States v. Trent*, No. 16-CR-00178-CRB-1, 2020 WL 1812242, at *2 (N.D. Cal. Apr. 9, 2020), *adhered to*, No. 16-CR-00178-CRB-1, 2020 WL 1812214 (N.D. Cal. Apr. 9, 2020) (granting compassionate release and finding that that "in the context of the COVID-19 pandemic," defendant's medical conditions "render[ed] [him] uniquely vulnerable to serious illness if he contracts COVID-19" and substantially diminished his ability to provide self-care in a small cell where social distancing was impossible); *United States v. Morrison*, No. 18-cr-00238-CRB-1, Dkt. No 72 (N.D. Cal. Apr. 29, 2020). As with these similarly situated defendants, Mr. Jay's severe health issues make him an appropriate candidate for compassionate release.

The Centers for Disease Control lists [REDACTED] as among the conditions that place individuals "at high-risk for severe illness from COVID-19." *See* CDC, *People*

1 *Who Are at Higher Risk for Severe Illness*, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html)
 2 [precautions/people-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) (last visited May 30, 2020). It further advises that those with Mr.
 3 Jay's comorbidities, like [REDACTED]
 4 [REDACTED]. See CDC, *Interim Clinical*
 5 *Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*,
 6 <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last
 7 updated June 2, 2020). This Court has made the same observation. See *Reid*, 2020 WL 2128855, at *3.
 8 So have numerous other courts in this district and elsewhere. *United States v. Vo*, No. 15-cr-00310-BLF-
 9 2, Dkt. 207, 2020 WL 2300101 (N.D. Cal. May 7, 2020) (granting compassionate release to 74-year-old
 10 inmate with hyperlipidemia and hypertension); *United States v. Simpson*, No. 11-CR-00832-SI-3, 2020
 11 WL 2323055 (N.D. Cal. May 11, 2020) (granting compassionate release to 62 year old with asthma and
 12 diabetes); *United States v. Connell*, No. 18-cr-00281, 2020 WL 2315858 (N.D. Cal. May 8, 2020)
 13 (granting compassionate release to 69 year old inmate at FCI Lompoc who suffers from hypertension,
 14 high cholesterol, and pre-diabetes); *United States v. Vo*, No. 15-cr-00310-BLF-2, Dkt. 207, 2020 WL
 15 2300101 (N.D. Cal. May 7, 2020) (hyperlipidemia and hypertension); *Burrill*, 2020 WL 1846788, at *1
 16 (diabetes and high blood pressure); *United States v. Ullings*, No. 1:10-cr-00406, 2020 WL 2394096
 17 (N.D. Ga. May 12, 2020) (hypertension); *United States v. Hunt*, No. 18-20037, 2020 WL 2395222 (E.D.
 18 Mich. May 12, 2020) (congestive heart failure and diabetes); *United States v. Foreman*, No. 3:19-cr-62
 19 (VAB) 2020 WL 2315908 (D. Conn. May 11, 2020) (hypertension); *United States v. Quintero*, No. 08-
 20 CR-6007L, --- F.Supp.3d ---, 2020 WL 2175171 (W.D.N.Y. May 6, 2020) (diabetes, and
 21 hypertension); *United States v. Howard*, No. 4:15-CR-00018-BR, 2020 WL 2200855 (E.D.N.C. May 6,
 22 2020) (diabetes); *United States v. Ardila*, No. 3:03-cr-264 (SRU), 2020 WL 2097736 (D. Conn. May 1,
 23 2020) (diabetes, cardiovascular disease, and hypertension); *United States v. Lacy*, No. 15-cr-30038, 2020
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 25 60131-AA, 2020 WL 1903280 (D. Or. Apr. 17, 2020) (hypertension); *United States v. Zukerman*, No.
 26 16-CR.-194 (AT), --- F.Supp.3d ---, 2020 WL 1659880, *2–*3 (S.D.N.Y. Apr. 3, 2020) (diabetes and
 27 hypertension); *United States v. York*, No. 3:11-CR-76; 3:12-CR-145, 2019 WL 3241166 (E.D. Tenn. July
 28 18, 2019) (coronary artery disease and diabetes). Mr. Jay's "conditions are, of course, not ones from

1 which an individual is expected to ‘recover’” *See Burrill*, 2020 WL 1846788 at *3 (citing U.S.
2 Sentencing Guidelines § 1B1.13 cmt. 1(A)(ii)).

3 Mr. Jay’s medical conditions are not his only high-risk characteristic. The CDC has explained
4 that, based on data from China, individuals like Mr. Jay who are above the age of 60 may have a case
5 fatality rate 18 times higher than that of individuals under the age of 40. *See CDC, Interim Clinical*
6 *Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*,
7 <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last
8 visited May 30, 2020). As this Court has stated, “[w]hen [Mr. Jay was] sentenced, nobody could have
9 predicted that a relatively brief term of imprisonment could be rendered a death sentence by an
10 unprecedented pandemic.” *United States v. Osorto*, No. 19-CR-00381-CRB-4, 2020 WL 2323038, at *5
11 (N.D. Cal. May 11, 2020).

12 **B. With Full Consideration of the § 3553(A) Factors, Including the COVID-19**
13 **Pandemic, Mr. Jay’s Time Served Constitutes a Sentence Sufficient, But Not Greater**
14 **Than Necessary, to Accomplish the Goals of Sentencing.**

15 Section 3582(c)(1)(A) provides, in relevant part, that courts may reduce [a] term of imprisonment
16 (and may impose a term of probation or supervised release with or without conditions that does not
17 exceed the unserved portion of the original term of imprisonment) after considering the factors set forth
18 in section 3553(a) to the extent they are applicable. 18 U.S.C. § 3582(c)(1)(A).

19 Section 3553(a), in turn, directs courts to “impose a sentence sufficient, but not greater than
20 necessary, to comply with the purposes” of sentencing, which are:

21 (A) to reflect the seriousness of the offense, to promote respect for the law,
22 and to provide just punishment for the offense;

23 (B) to afford adequate deterrence to criminal conduct;

24 (C) to protect the public from further crimes of the defendant; and

25 (D) to provide the defendant with needed educational or vocational
26 training, medical care, or other correctional treatment in the most effective
27 manner;

28 18 U.S.C. § 3553(a)(2). Each of these factors is met here.

1 **1. “Sufficient but not greater than necessary” and “reflect the seriousness of the**
 2 **offense, ... promote respect for the law, and ... provide just punishment for**
 3 **the offense.”**

4 The COVID-19 pandemic requires a recalibration when determining when a sentence is
 5 “sufficient but not greater than necessary.” “To avoid a sentence that was sufficient but no greater than
 6 necessary from becoming one immeasurably greater than necessary” requires a reduction in the sentence
 7 of vulnerable, low-security inmates like Mr. Jay. *United States v. Park*, No. 16-CR-473 (RA), 2020 WL
 8 1970603 at *5 (S.D.N.Y. Apr. 24, 2020) (emphasis added) (internal citation omitted); *see also United*
 9 *States v. Mel*, No. CR TDC-18-0571, 2020 WL 2041674 at *3 (D. Md. Apr. 28, 2020) (finding release
 10 appropriate where “the actual severity of the sentence as a result of the COVID-19 outbreak exceeds
 11 what the Court anticipated at the time of sentencing.”).

12 Mr. Jay is set to be released on January 27, 2021, about seven-and-a-half months from now. *See*
 13 *Au Decl. Ex. C, BOP Inmate Registry Entry for S. Jay*. He has already served seventeen months, so his
 14 sentence is more than two-thirds complete. We respectfully submit that in light of the changed
 15 circumstances arising from the COVID-19 pandemic, serving “most of the original sentence imposed” is
 16 “long enough to reflect the seriousness of the offense, promote respect for the law, provide just
 17 punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from
 18 further crimes.” *See United States v. Rodriguez*, No. 2:03-CR-1627337, 2020 WL 1627331 at *11-*12
 19 (E.D. Pa. Apr. 1, 2020); *see also Sarkisyan*, at *3 (finding this factor satisfied where inmate had five
 20 months left in a fifteen-month sentence); *United States v. Tran*, No. CR 08-00197-DOC, 2020 WL
 21 1820520 (C.D. Cal. Apr. 10, 2020) (“the applicable § 3553(a) factors support Defendant’s request for
 22 compassionate release and that Defendant will not pose a threat to the community. While the Court
 23 acknowledges the seriousness of Defendant’s offense, Defendant has already served the vast majority of
 24 his sentence”).

25 In addition, given Mr. Jay’s age, it will be challenging for him to find a new line of work. *See*
 26 *United States v. Jaime*, 235 F. Supp. 3d 262, 265 (D.D.C. 2017) (“the Court is mindful of the potentially
 27 devastating collateral consequences of a criminal conviction, including it being an impediment to future
 28 employment”). Mr. Jay has also suffered serious deterioration in his health during the time he has been
 29 incarcerated, including the amputation of a toe as a result of an infection that occurred while he was in

1 prison. In sum, while Mr. Jay acknowledges the seriousness of his offense, he has been adequately
 2 punished for his conduct.

3 **2. “Adequate deterrence” and “protect[ing] the public”**

4 Compassionate release in this case is also consistent with the objectives of deterrence and
 5 protecting the public. Mr. Jay was convicted of a non-violent offense, and is now 61 years old, meaning
 6 that his risk of recidivism is very low. “Recidivism rates decline relatively consistently as age
 7 increases,” with the lowest rates for offenders aged 50 and older. U.S.S.C., *Measuring Recidivism: The*
 8 *Criminal History Computation of the Federal Sentencing Guidelines* (May 2004),
 9 [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf)
 10 [publications/2004/200405_Recidivism_Criminal_History.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf) at 12, Exhibit 9. Mr. Jay had no criminal
 11 history prior to the offenses for which he is incarcerated. *See* Jay Decl. ¶ 2. The offenses for which he
 12 was convicted are non-violent crimes, and there would be no basis to view Mr. Jay as a danger to the
 13 community should he be granted compassionate release or placed in home detention. Moreover, Mr.
 14 Jay’s conduct in prison has been exemplary; he has not incurred any disciplinary infractions during the
 15 17 months he has been imprisoned. *See* Jay Decl. ¶ 3.

16 Further, even if Mr. Jay were to be released before he serves his full term of incarceration, the
 17 policy objective of promoting deterrence of others has been fulfilled. Mr. Jay has faced real punishment
 18 by being incarcerated far from home, suffering additional severe health issues while incarcerated, and
 19 having forfeited his professional livelihood and standing in his community. This punishment is sufficient
 20 to deter others who might engage in similar criminal conduct.

21 The public will also be protected because, if released, Mr. Jay will be subject to a three-year term
 22 of supervised release, during which time he will be monitored by the probation office. Moreover, Mr.
 23 Jay has lost his ability to continue to perform tax preparation services, so there is no chance that he will
 24 engage in conduct of the kind that resulted in his conviction. To the extent the Court feels it necessary, it
 25 can also impose part of his term of supervised release to be served under home confinement.

26 **3. “Needed medical care, or other correctional treatment”**

27 Granting Mr. Jay’s motion would also allow him to obtain needed medical care and other
 28 correctional treatment. If released, Mr. Jay will reside at his family’s home at [REDACTED]

1 [REDACTED] See Jay Decl. ¶ 5. He will have medical coverage under his wife's employment
 2 insurance and will receive medical treatment in the [REDACTED] area with the physicians who
 3 treated him prior to incarceration. *Id.* Furthermore, he will receive emotional and financial support from
 4 his family, namely, his wife and children who also live at the [REDACTED] address. *Id.*

5 **C. Both The Number of Tested Cases in Mr. Jay's Facility and Mr. Jay's Immigration**
 6 **Status are Immaterial.**

7 Although there are presently no confirmed cases of COVID-19 at the Giles W. Dalby
 8 Correctional Facility where Mr. Jay is incarcerated, that statistic is not a reason to deny compassionate
 9 release. The number of confirmed cases is no better than the testing regimen employed by the prison—
 10 and says nothing at all about the likelihood of cases in the future. As Judge Seeborg has noted, "Federal
 11 correctional institutions, which had reported zero COVID-19 cases only weeks ago, and despite the steps
 12 the BOP has taken to contain the disease within its facilities, are now reporting numerous virus-related
 13 deaths." *Burrill*, 2020 WL 1846788, at *2 (citing Ryan Lucas, *'They're All Really Afraid': Coronavirus*
 14 *Spreads In Federal Prisons*, NPR (Apr. 7, 2020), [https://www.npr.org/2020/04/07/828319691/they-re-](https://www.npr.org/2020/04/07/828319691/they-re-all-really-afraid-coronavirus-spreads-in-federal-prisons)
 15 [all-really-afraid-coronavirus-spreads-in-federal-prisons](https://www.npr.org/2020/04/07/828319691/they-re-all-really-afraid-coronavirus-spreads-in-federal-prisons))); *see also Sarkisyan*, 2020 WL 2542032, at *2
 16 ("If the Government wishes to argue that early release in this case (or any other case before this Court) is
 17 inappropriate because the defendant's facility has no reported cases of COVID-19, that claim must be
 18 adequately supported with actual test results from testing conducted by the Bureau of Prisons. This Court
 19 does not and will not consider a dearth of testing competent evidence that there are no COVID-19 cases
 20 in a given BOP facility."). Media reports and experts have regularly noted the incompleteness of the
 21 Bureau of Prison's COVID-19 case tracking. *See, e.g.,* Sadie Gurman, *More Than 70% of Inmates*
 22 *Tested in Federal Prisons Have Coronavirus*, The Wall Street Journal (Apr. 30, 2020),
 23 [https://www.wsj.com/articles/more-than-70-of-inmates-tested-in-federal-prisons-have-coronavirus-](https://www.wsj.com/articles/more-than-70-of-inmates-tested-in-federal-prisons-have-coronavirus-11588252023)
 24 [11588252023](https://www.wsj.com/articles/more-than-70-of-inmates-tested-in-federal-prisons-have-coronavirus-11588252023) (quoting Dr. Ashish Jha, director of Harvard University's Global Health Institute, as
 25 saying, "When I hear numbers like that, my thoughts are there is massive under-testing, there are
 26 probably thousands of additional people who are infected that they may not have captured yet, and it
 27 really feels like a public health crisis in the making.").

For that reason, many courts have granted compassionate release to inmates housed in facilities with no confirmed cases. For example, in *United States v. Atkinson*, No. 2:19-CR-55 JCM (CWH), 2020 WL 1904585, at *2-*4 (D. Nev. Apr. 17, 2020), the judge recognized that the realities of prison life make it impossible for medically vulnerable inmates to follow CDC guidelines to protect themselves in the face of COVID-19, *id.* at *4, and therefore granted compassionate release, even though the inmate's facility had no confirmed cases. Similarly, in *United States v. Amarrah*, No. 17-20464, 2020 WL 2220008 (E.D. Mich. May 7, 2020), a district court in Michigan released a medically vulnerable inmate from FCI Loretto, despite no reported COVID-19 cases at the facility, because he could not adequately protect himself in line with CDC guidelines. *Id.* at *2–3. Other courts have done the same. *See United States v. Washington*, No. 2:07-cr-258, Dkt. No. 529 (E.D. Pa. May 14, 2020); *United States v. Ben-Yhwh*, No. CR 15-00830 LEK, 2020 WL 1874125 (D. Haw. Apr. 13, 2020); *United States v. Asaro*, No. 17-CR-127 (ARR), 2020 WL 1899221 (E.D.N.Y. April 17, 2020) (“absent more information about how much testing the BOP is conducting, it is possible that undetected cases are present in the facility”); *Burrill*, 2020 WL 1846788, at *3–*4 (“Prison conditions mean incarcerated individuals, as well as society as a whole, are safer the more defendants are released.”).

It would likewise be inappropriate to deny Mr. Jay compassionate release because of the possibility that he is subject to an immigration detainer and is not a U.S. citizen. No statute prohibits the granting of compassionate release on the basis of a detainer, and other courts have granted compassionate release to inmates who were subject to detainers. *See United States v. Al-Jumail*, No. 12-20272, 2020 WL 2395224, at *7 (E.D. Mich. May 12, 2020) (“It may be that ICE will act on its Detainer against Defendant. However, the matter before this Court is whether Defendant is entitled for a reduction of sentence based on compassionate release.”); *Ardila*, 2020 WL 2097736, at *2 (granting compassionate release where inmate was subject to an immigration detainer). The presence of a detainer is also not enumerated by the United States Sentencing Commission as a factor to be considered in determining whether an inmate qualifies for compassionate release. USSG § 1B1.13 cmt. n.1. Similarly, not being a citizen or national of the United States is no bar to compassionate release: Like the presence of a detainer, it is not mentioned in the statute, the Sentencing Guidelines, or the Bureau of Prisons' own program statement as a factor to be considered. *See Federal Bureau of Prisons, Compassionate*

1 *Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and*
 2 *4205(g) (Aug. 12, 2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf at Program*
 3 *Statement p. 10; United States v. Bennett, No. 05 CR. 1192-1 (NRB), 2020 WL 2539077, at *1*
 4 *(S.D.N.Y. May 18, 2020) (granting compassionate release to a British citizen).*

5 **IV. CONCLUSION**

6 The Court should reduce Mr. Jay's sentence and release him to protect his life. Mr. Jay cannot
 7 adequately protect himself from COVID-19 at Giles W. Dalby Correctional Facility, and he will almost
 8 certainly not receive adequate care if infected. Mr. Jay is slated to be transferred to supervised release in
 9 less than eight months.

10 For the foregoing reasons and any others that the Court deems appropriate and just, Subhash Jay
 11 respectfully requests that the Court grant reduction in sentence to time served and amend the conditions
 12 of supervised release as requested.

13
 14 Dated: June 5, 2020

Respectfully submitted,

DURIE TANGRI LLP

16
 17 By: /s/ Benjamin B. Au
 18 BENJAMIN A. AU
 GALIA Z. AMRAM
 RAGHAV K. KRISHNAPRIYAN

19 Attorneys for Defendant SUBHASH JAY

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Benjamin B. Au

BENJAMIN B. AU